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No. 205

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California, entered in the above-entitled case on January 21, 1952, denying a writ to review the order of the Public Utilities Commission of the State of California, entered on July 3, 1951.

OPINIONS BELOW

The opinion of the Public Utilities Commission (R. 6-19) is reported at 50 Cal. P. U. C. 749. The Supreme Court of the State of California rendered no opinion.

JURISDICTION

The order of the Supreme Court of the State of California denying a writ of review was entered on January 21, 1952 (R. 68). A petition for rehearing, seasonably filed, was denied on February 18, 1952 (R. 74). By order of Justice Douglas, dated April 17, 1952, the time for filing a petition for a writ of certiorari was extended to and including July 17, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), on the ground that the decision of the Supreme Court of the State of California denied a title, right, privilege or immunity specifically set up and claimed by the United States under the Federal Power Act, 41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.* The cases relied upon to sustain the jurisdiction of this Court are *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U.S. 366, 371-373; *Madera Sugar Pine Company* v. *Industrial Accident Commission of the State of California*, 262 U.S. 499, 500; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380; *Caldarola* v. *Eckert*, 332 U.S. 155, 158; *United States* v. *Allegheny County*, 322 U.S. 174, 183-184.

Respondent California Electric Power Company applied to respondent Public Utilities Commission of the State of California for a determination whether the P-2 rate schedule prescribed by the California Commission applied to the Company's sale of electric energy to the United States Navy Department's Ammunition Depot in Hawthorne,

Nevada. The United States, appearing through the Navy Department, claimed, both orally and in briefs filed with the California Commission, that, under the Federal Power Act, the California Commission had no jurisdiction over the sale, and that under Part I and Part II of that Act exclusive jurisdiction was in the Federal Power Commission. The same issues were raised in the Government's petition for rehearing filed with the California Commission (R. 20-23). In the State Supreme Court, the United States raised the same questions in its petition for a writ of review (R. 1-5), and in its petition for rehearing from the denial of review (R. 68-69). The court below rejected the Government's contentions and affirmed the order of the California Commission (R. 68, 74).[1]

The questions presented are substantial as is

[1] Under the California practice, the denial by the State Supreme Court without written opinion of an application for writ of review of an order of the Public Utilities Commission constituted "a final adjudication of the correctness and the validity of the decision which it is attempted to have reviewed." *People* v. *Hadley*, 66 Cal. App. 370, 375; see also *Southern California Edison Co.* v. *Railroad Commission*, 6 Cal. 2d 737, 747, 758; *Funeral Directors Ass'n* v. *Board of Funeral Directors*, 22 Cal. 2d 104, 107-108; *McDonough* v. *Garrison*, 68 Cal. App. 2d 318, 325; cf. *Southern Pacific Co.* v. *Van Hoosear*, 72 F. 2d 903, 905 (C.A. 9); *Wallace Ranch Water Co.* v. *Railroad Commission of California*, 47 F. 2d 8, 9 (C.A. 9).

In *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U.S. 366, this Court recognized that "the denial of the petition was necessarily a final judicial determination, * * * the absence of an opinion by the [California] Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented * * *" (251 U.S. at 373).

more fully developed under the reasons for granting the writ (*infra*, pp. 10-25).

QUESTIONS PRESENTED

The ultimate question is whether under the Federal Power Act the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission which is also asserting sole jurisdiction, over the sales of electric energy in California by the California Electric Power Company for use in connection with the Navy Department's Ammunition Depot at Hawthorne, Nevada.

More specifically, the questions presented are:

1. Whether the interstate sale to the Navy is a "sale of electric energy to any person for resale" subject to federal rather than state regulation under Part II of the Federal Power Act, where (a) the Navy's resales are to the tenants of its housing development and to business concessions on the naval reservation and (b) a substantial part of the energy so furnished by the Company is generated at hydro-electric projects licensed under Part I of the Act.

2. Whether, since the Navy's purchases and sales are not subject to regulation by Nevada, California is the only "state directly concerned" with the sales of electric energy by the Company to the Navy, within the meaning of Section 20 of Part I of the Federal Power Act, and, hence, has independent rather than coordinate jurisdiction with

Nevada over the Company's rates for these interstate sales of electric energy to the Navy.[2]

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a *et seq.*) appear in the pamphlet copy of the Act submitted with this petition.

STATEMENT

Respondent California Electric Power Company (Company) is engaged in the business of generating and distributing electric energy in the States of California and Nevada (R. 1, 7). It renders public utility service in several counties in southeastern California and its Nevada Division serves parts of Nye and Esmeralda counties, Nevada (R. 7).

Since July 1, 1943, the Company has been selling to the Navy Department, under contract, electric energy required "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada" (R. 2, 10, 45). A large percentage of the energy so furnished is generated at the Company's hydroelectric projects licensed under Part I of the Federal Power Act; at times, however, all or a portion of the energy comes from non-licensed sources and other electric production agencies with which

[2] The United States reserves the right, should the questions be reached, to urge that Section 20 of Part I does not pertain to sales for resale in interstate commerce, and further, that, if it does, it is *pro tanto* repealed by implication by Part II.

the Company maintains interconnections (R. 2, 11, 45). Irrespective of where generated, the energy sold to the Navy is transmitted at 55,000 volts to the Company's substation at Mill Creek in California, where it is delivered to the Navy (R. 2, 11, 45). The Navy in turn transmits the energy over its own 55,000 volt line across the California-Nevada state boundary to Hawthorne, Nevada, where it is reduced to distribution voltage (R. 2, 8). The Navy's transmission line is approximately 55 miles in length, about one-half being in California and the other half in Nevada (R. 8).

At Hawthorne, in addition to using the energy purchased from the Company for the power and energy requirements of its industrial activities, the Navy furnishes a substantial part thereof to the tenants of the Naval personnel's quarters ("public quarters"), as well as to tenants of the "Navy Low-Cost Housing Project" (known as Babbitt) which provides living quarters and facilities for civilians connected with the Depot (R. 2, 11, 46). The Navy makes a separate charge to each of the tenants of these living quarters and business concessions for the electric energy furnished them (R. 2, 46). Residence or operation of business concessions at Babbitt is permitted only so long as it is consistent with the Navy's obligations. The lease agreements with the occupants of the "public quarters" and of Babbitt provide that the rental privilege ceases upon termination of employment; for the business concessions, the Navy

issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot" (R. 14-15).

By decision dated July 1, 1948, respondent Public Utilities Commission of the State of California (California Commission) authorized a general rate increase for the Company to be effective August 1, 1948, and in connection therewith prescribed special schedules, including a so-called "Schedule P-2-Power-Wholesale General Service," to replace a substantial number of special rate contracts, with which the Commission was dissatisfied (R. 2, 7, 8-9). On July 30, 1948, the Company sought to terminate its contract with the Navy and to apply, as of October 1, 1948, the P-2 Schedule to its sales to the Navy (R. 2, 9). Thereafter, in August 1948, the Company applied to the California Commission for a ruling whether the P-2 Schedule was applicable to these sales since the Navy was claiming, among other things, that the California Commission did not have jurisdiction to prescribe the rates to be paid by it (R. 2, 6-7).

A hearing on this application was held by the California Commission on October 7, 1949 (R. 3, 7). That Commission also scheduled further hearings but took them off its calendar when the Federal Power Commission (Federal Commission) indicated, through correspondence, a desire to explore the question of jurisdiction (R. 7). The Federal Commission, on February 15, 1950, issued an order to the Company to show cause why the Company's

sales to the Navy were not subject to its jurisdiction under the Federal Power Act, and thereafter, pursuant to mutual agreement between the two commissions, concurrent hearings were held on March 20 and 21, 1950, on the jurisdictional questions involved (R. 3, 7).

On April 13, 1951, the Federal Commission issued its opinion and order, holding that under the Federal Power Act it had exclusive jurisdiction over the Company's sales to the Navy and directing the Company to file the 1943 contract as a rate schedule and to charge the rate specified until or unless duly superseded by new rates filed in accordance with the Federal Commission's Rules and Regulations (R. 24-41). Opinion No. 212 in F.P.C. Docket No. E-6269; *Re California Electric Power Company,* 89 PUR (NS) 359. On June 5, 1951, the Federal Commission denied applications for rehearing filed by the Company and the Legal Department of the California Commission, and on June 20, 1951, the Company filed a petition for review of the Federal Commission's order in the Court of Appeals for the Ninth Circuit, as authorized by Section 313(b) of the Federal Power Act. *California Electric Power Company* v. *Federal Power Commission,* C.A. 9, No. 12987. (The United States has intervened in this proceeding in support of the Federal Commission's order.) [3]

[3] All briefs have been filed in this case, including a brief *amicus curiae* submitted by the California Commission, and oral argument was had on August 4, 1952.

Thereafter, on July 3, 1951, the California Commission issued its order and opinion in which it concluded, on substantially the same record, that notwithstanding the Federal Commission's ruling, it, rather than the Federal Commission, had exclusive jurisdiction over these sales. According to the California Commission, regulation by it was not precluded either by the Commerce Clause or the Federal Power Act, even if it be assumed that the sales were in interstate commerce (R. 11). In reaching this conclusion, the California Commission ruled that Nevada, not having authority over the Navy's purchases or sales of electric energy, was not "directly concerned" with the Company's sales to the Navy within the meaning of Section 20 of the Power Act's Part I, and consequently, since the California Commission was the kind of state "commission or other authority" there contemplated, it had sole jurisdiction over a sale under that Section (R. 11-12, 13-14).

The California Commission went on to hold that this jurisdiction was not ousted by the Federal Commission's authority under Part II of the Federal Power Act. While admitting that "the Navy is in a sense 'reselling' energy purchased from" the Company (R. 15), the Commission applied Section 3's definition of "person" (which does not include the United States) to Section 201(d)'s definition of wholesale sale ("sale * * * to any person for resale") and concluded that Part II was inapplicable to such sales to the United States

(R. 14). In addition, it held that "sale for resale", as used in Part II, embraces only sales for resale to companies engaged in the public utility business, and not sales to tenants of the reseller (R. 14-15). Finally, the Commission ruled that, since these sales were regulable by the State under Section 20 of Part I, federal regulation under Part II was precluded by Section 201(a) and (b) of the Act (R. 15-16).

The State Supreme Court (three judges dissenting) denied the Government's petition, filed in accordance with Section 67 of the Public Utilities Act of California (now Public Utilities Code, Sections 1756-1760),[4] and affirmed without opinion (R. 68).

REASONS FOR GRANTING THE WRIT

This case raises important questions under the Federal Power Act as to the division between the States and the Federal Government of regulatory jurisdiction over sales of electric energy in inter-

[4] In so far as here pertinent, Section 67 provides:

> Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. * * * No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided*, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases.

state commerce.[5] The California Commission, by reading the Act to vest it with exclusive jurisdiction over the Company's sales to the Navy, has reached a conclusion squarely in conflict with that reached by the Federal Commission in its order pending for review in the Ninth Circuit (see *supra* p. 8).[6] Not only does the California Commission's ruling result in mutually incompatible assertions of exclusive jurisdiction over the same sale, but it improperly infringes upon the area subjected by Congress to federal regulation. For one of the principal grounds on which the California Commission justified its claim of jurisdiction has been specifically rejected as unsound by this Court in *Pennsylvania Water & Power Co.* v. *Federal*

[5] While the California Commission merely assumed that the sale was interstate in nature, it is well-established that where, as here, the sale is made to one who transmits the energy across state boundaries, the sale is in fact in interstate commerce as defined both by the courts and in Section 201(c) of the Power Act. See, *e.g.*, *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61. See also *infra*, p. 16, fn. 15.

[6] The California Commission's General Order No. 96, authorizing utilities to furnish electric service "at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments" (R. 12); does not, in the circumstances of this case, make this conflict academic. The Company is seeking to charge the Navy the full P-2 rate sanctioned by the California Commission's order here involved. The Federal Commission has, on the other hand, directed the Company to file the 1943 Navy contract as a rate schedule and to charge no more than the rate there specified until duly superseded. Inasmuch as the contract rate is different and lower than the P-2 schedule rate, the Company cannot charge—nor can the Navy pay—the P-2 rate without violation of the Federal Commission's order.

Power Commission, 343 U.S. 414, two others are in conflict with the holding in *Wisconsin-Michigan Power Company* v. *Federal Power Commission*, C.A. 7, Nos. 10475, 10480 (decided June 9, 1952), and the remaining grounds are demonstrably unsound. In view of these conflicts, and the incongruity of assertions of mutually exclusive jurisdiction by the state and federal commissions over the identical transaction, review by this Court is required to correct the error of the California Commission and thereby to restore the balance in the relationship between the states and the federal government in this field.[7]

1. There is no merit to the California Commission's holding that, although "the Navy is in a sense 'reselling' energy purchased from" the Company (R. 15), the Company's sale to the Navy nevertheless is not a "sale of electric energy at wholesale in interstate commerce" subject to regulation by the Federal Commission under Part II of the Power Act (Section 201(b)). Each of the three grounds on which this holding is predicated is incorrect.[8]

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[7] The Court may deem it desirable to withhold action on this petition until the Ninth Circuit has issued its opinion on the Federal Commission's order pending for review before it, and perhaps until a petition for certiorari is filed in that case or the time therefor has expired. See *supra*, p. 8.

[8] The additional ground advanced by the Company, that the sale was not for resale since resale was not expressly provided for in the contract with the Navy (R. 60), is likewise without substance. The Company does not deny that it knew of the resale and such knowledge is sufficient. See *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55, 62; *Cf. Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 958-960 (C.A. 2), certiorari denied, 319 U.S. 741. More-

(a). The first ground—based on Section 201 (d)'s definition of a wholesale sale as a "sale of electric energy to any person for resale", coupled with Section 3's definition of "person" so as not to include the United States (R. 14)[9]—improperly applies these definitions without regard to their history and purpose. Cf. *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198, 201, 206. The error in this strictly literal approach is manifest from *Wisconsin-Michigan Power Company* v. *Federal Power Commission*, C. A. 7, Nos. 10475, 10480 (decided on June 9, 1952), in which the Court of Appeals for the Seventh Circuit reached a contrary conclusion. In that case, which involved the closely related situation of sales for resale to a municipality—likewise excluded from Section 3's definition of "person"[10]—the Seventh Circuit, after consideration of the Act's legislative history and purpose, concluded that the "apparent inconsistency was an oversight," "the 'slip' was inadvertent" and the

over, there is nothing in Section 201(b) which makes the Federal Commission's jurisdiction dependent upon the terms used in contractual agreements, which can be phrased to fit the whims or objectives of either party, rather than upon the facts as they exist.

[9] Section 3(4) defines person to mean an individual or corporation. Section 3(3) defines corporation to mean "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined."

[10] The California Commission based its holding that the Company's sales for resale to Mineral County, a municipality, were exempt from regulation by the Power Commission under Part II on the same reasoning (R. 18). We are informed that Mineral County has filed a petition for a writ of certiorari to review these rulings of the California Commission. No. 206, this Term.

congressional intent was "not so to limit the word 'person' as to exclude any one selling electric energy for resale" (slip opinion, pp. 11, 12).

The legislative history of these provisions fully supports the Seventh Circuit's conclusion as against that of the California Commission.[11] As the Federal Commission points out (R. 32-33), that history reveals that "person" was introduced into the definition of "wholesale sale" not for the purpose of limiting the Commission's jurisdiction over wholesale sales, but merely as an incident to a rephrasing of the definition of "wholesale sale" to close an obvious loophole in another aspect of the earlier wording.

The definition of "wholesale sale" in the bill (S. 2796, 74th Cong., 1st Sess.), as it passed the Senate and came to the House, did not contain "person" nor did it exempt sales for resale to the United States, to municipalities, or anyone else

[11] Also supporting this conclusion is the fact that in all cases, including the present case and the *Wisconsin-Michigan* case, in which this question has been raised, the Federal Commission has consistently construed Section 201(d) not to exempt from its jurisdiction any sales for resale in interstate commerce. *Otter Tail Power Company*, 2 F.P.C. 134, 136-140, 33 PUR(NS) 257, 259-269; *Connecticut Light & Power Company*, 3 F.P.C. 132, 144, 44 PUR(NS) 170, 181, affirmed, 141 F. 2d 14 (C.A. D.C.), reversed on other grounds, 324 U.S. 515; *Otter Tail Power Company*, 8 F.P.C. 393; *Wisconsin Power & Light Company*, F.P.C. Opinion No. 215, issued July 12, 1951, pending on petition for review (C.A. D.C.), Nos. 11224, 11225; see, also *City of Los Angeles* v. *The Nevada-California Electric Corp.*, 2 F.P.C. 104, 32 PUR(NS) 193. This consistent interpretation by the agency charged with the administration of the Act is, under well-established principles, entitled to great weight. See, *e.g.*, *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294; *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549.

because of who he was.[12] As a result of an amendment added without comment on the floor of the Senate (79 Cong. Rec. 8858), "wholesale sale" was defined to extend only to these situations where the energy was "sold for resale after its transmission in interstate commerce or before such transmission if the same is thereafter so transmitted." Since the omission of such sales made in the course of transmission resulted in the proposed legislation's being inapplicable to the very type of sale involved in *Public Utilities Commission* v. *Attleboro Co.*, 273 U.S. 83, the House Committee corrected this defect by adopting the present broad definition of "wholesale sale" and, in so doing, included the word "person" for the first time.

In commenting on the new definition, however, the Committee's report did not stress "person" as would be expected if the aim of its use was thereby to restrict the Commission's jurisdiction. On the contrary, the Committee did not even mention that the sale must be to a "person", but rather stated without qualification that "a 'wholesale' transaction is defined to mean the sale of electric energy for resale * * *" (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8). This comment, far from indicating a restrictive view of the Commission's

[12] S. 1725, 74th Cong., 1st Sess., as introduced in the Senate, and S. 2796, the substitute bill reported by the Senate Committee on Interstate Commerce, proposed that the Federal Commission have jurisdiction over "the sale of electric energy at wholesale in interstate commerce." Although at this stage there was no definition of "wholesale sale", the bills in effect defined the phrase by excluding "retail sale of such energy in local distribution."

jurisdiction, makes clear the intent that the Commission should regulate all interstate sales for resale regardless of who the purchaser for resale may be.[13]

In addition, the report nowhere manifested a purpose to exempt any sales for resale, let alone such sales to the United States or municipalities. This is particularly significant, for not only did the report indicate when an exemption was intended[14] but Section 201(f) expressly exempts the United States and municipalities, when sellers for resale, from the provisions of Part II.[15] Had the committee intended also to exempt sales for resale to such governmental bodies by its use of "person", it certainly would have pointed that out. These considerations, plus the further one that the House definition was intended generally

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[13] While the Committee elsewhere described a wholesale sale as a "sale to any person for resale" (*id.* at p. 27), there again "person" was not emphasized, nor was there any indication, such as quotation marks, that "person" was used in the limited meaning of Section 3(3) and 3(4), rather than in its normal all-inclusive sense.

[14] Thus, immediately following the first restatement of the definition of wholesale sales, the report added "'and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce." H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8.

[15] The Company argues from Section 201(f) that Part II's definition of interstate commerce "does not apply to the United States and neither the United States nor its Navy Department is or can be engaged in interstate commerce under Part II of said Act," (R. 63). But the regulation here being imposed is upon the Company and not the United States, and the fact that the sale is to an exempt agency does not deprive it of its interstate character so far as the Company is concerned. *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679, 681, fn. 2; *cf. Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 511-515.

to broaden the Senate definition which it superseded, strongly suggest that "person" in Section 201(d) was not used in the artificially restricted meaning of Section 3(3) and 3(4).[16]

Further buttressing this conclusion is the fact that the contrary position adopted by the California Commission has an unreasonable result not only when applied to municipalities, as the *Wisconsin-Michigan* case demonstrates (slip opinion p. 12), but also when applied to the United States. It is well recognized that Congress established the Federal Power Commission to regulate interstate sales of electric energy for resale for the purpose of protecting the public from exploitation by public utilities. See, *e.g., Federal Power Commission* v. *Hope Natural Gas Company,* 320 U.S. 591, 610. The effect of the California Commission's construction, however, is to impute to Congress an intent to deny to the Federal Government—of which Congress is a part and whose financial interests are its direct concern—the federal protection which it has provided for non-governmental purchasers whose financial interests are of less immediate concern to it. In addition, this construction presumes a willingness by Congress to remit the financial interests of the Federal Government, but not those of the public generally, to the protection afforded by state regulation, however inadequate it might be. Such an incongruous result clearly warrants a refusal me-

[16] The Conference Committee adopted the House definition without comment. H. Rep. No. 1903, 74th Cong., 1st Sess.

chanically to adhere to the literal definition of the Act. *Lawson v. Suwannee S.S. Co.*, 336 U.S. 198, 201, 206; *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 and cases cited; *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 55.

(b). The rationale of the *Wisconsin-Michigan* case also demonstrates the fallacy in the California Commission's second ground, *i.e.*, that "sale for resale" as used in the Act was intended to be limited to sales of companies in the public utility business and not to extend to sales where, as here, the resale is to tenants of the reseller (R. 14-15). For, as we have just shown, Congress intended that all interstate sales of electric energy for resale be subject to regulation by the Federal Commission without regard to the character of the reseller or of its business.

While it is true, as noted by the California Commission (R. 15), that *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, involved a sale for resale to a public utility and that one of the purposes of the Federal Power Act was to fill the gap in utility regulation revealed by that case, there is nothing in the *Attleboro* case which even suggests that there are separate categories of wholesale sales, with sales to non-public-utilities being regulable by the states. Since the particular reseller in the *Attleboro* case was a public utility, the Court naturally dealt with the problem in those terms, but the clear thrust of the decision was that all wholesale interstate sales were exempt from state regulation. Cf. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*,

332 U.S. 507, 515; *Wisconsin-Michigan Power Company* v. *Federal Power Commission*, *supra*, slip opinion, p. 7.

Nor is there any intimation of any such distinction in the Act or its legislative history. No qualification of "sales for resale" appears in the Act, and none was intended. See *supra*, pp. 14-18. Congress construed the *Attleboro* case as prohibiting state regulation of all interstate wholesale transactions (S. Rep. No. 621, 74th Cong., 1st Sess., p. 17; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7-8), and it was this gap as thus understood which the Power Act was intended to fill. In addition, this Court has repudiated such a distinction by its repeated rulings that the division of regulatory jurisdiction between state and federal governments was "sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 517. "Congress occupied only a part of the field. As to sales, only the sale of gas in interstate commerce for resale was covered. Direct sales for consumptive use were designedly left to state regulation." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334; cf. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456, 467.[17]

[17] While these cases relate to the Natural Gas Act, the language and purpose of that Act are substantially the same as those of the Federal Power Act.

(c). The third ground, that an interstate wholesale sale of energy generated at a hydroelectric project licensed under Part I is exempt from rate regulation under Part II (R. 15-16), has already been rejected by this Court in *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 418-419. See, also, *Safe Harbor Water Power Co. v. Federal Power Commission*, 179 F. 2d 179 (C.A. 3), certiorari denied, 339 U.S. 957. In *Penn Water*, the Company urged, as the California Commission ruled here, that the provisions of Part II are inapplicable to sales which are subject to potential state regulation under Part I, since Section 201(a) declares that federal regulation shall "extend only to those matters which are not subject to regulation by the States." This Court, however, refused to adopt this construction of Part II, with the comment that "* * * the language of Part II of the Act makes all 'public utilities' subject to the regulation it prescribes. No reason has been advanced which could possibly justify a judicial exception to this statutory command" (p. 418). This ruling leaves no doubt that the Company's interstate wholesale sales to the Navy of energy generated at hydroelectric projects licensed under Part I are not exempt, because of their source, from rate regulation by the Federal Commission under the provisions of Part II. It follows that the Federal Commission has jurisdiction over the Company's sales to the Navy to the exclusion of the California Commission. For this Court has al-

ready held, with regard to the parallel Natural Gas Act, that "as to rates to be effective in the future * * * Congress by that Act * * * preempted the regulatory powers over the transportation and sale of natural gas in interstate commerce" (*Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456, 466), and that the Federal Commission's jurisdiction is "exclusive," *id.*, at 467.[18]

2. Even if it be assumed, contrary to the foregoing, that the Federal Commission does not have sole jurisdiction over these sales under Part II of the Federal Power Act, the California Commission further erred in holding that Section 20 of Part I vested it with jurisdiction over the Company's sales to the Navy.[19] Section 20 authorizes the Federal Commission to regulate the rates

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[18] See, also, *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *First Iowa Coop.* v. *Federal Power Commission*, 328 U.S. 152; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61; *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377; *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119.

[19] While Section 20 is not expressly limited to retail sales in interstate commerce, we think it demonstrable—and we shall so urge, if the question should be reached in the present case—that Section 20 does not extend to interstate sales for resale and, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act. See Brief for Federal Power Commission in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, Nos. 428, 429, October Term, 1951, pp. 124-129, 135-137. This Court did not find it necessary to reach these questions in the *Penn Water* case.

The Company's claim that Section 19, rather than Section 20, is applicable (R. 61-62), fails to recognize the exception carved out of Section 19, by Section 20, for interstate sales.

charged for electric energy generated at hydroelectric projects licensed under Part I of the Act and sold in interstate commerce "wherever any of the States directly concerned has not provided a commission or other authority to enforce [the Section's] requirements * * * within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates and charges of payment therefor, * * *." Far from supporting the California Commission's position, this Section places authority over the sales in this case in the Federal Commission.

(a). Although Section 20 provides for joint regulation by the "States directly concerned," the California Commission ruled that Nevada was not "directly concerned" since it "has no jurisdiction over the rates the Navy pays to [the Company] nor over the rates the Navy charges its personnel and tenants" (R. 11, 13); consequently, the Commission held, its independent action satisfied the conditions of Section 20, inasmuch as it was a "properly constituted authority." But the doctrine of intergovernmental immunity, on which this conclusion is based, no more precludes regulation of the Company's sale to the Navy by Nevada than it does regulation by California. As far as that doctrine is concerned, there is no reason suggested—nor are we aware of any—why California, but not Nevada, would have jurisdiction over this sale, or indeed why California's authority, if any, should be greater than that of Nevada. Intergovernmental

immunity operates with an even hand on both California and Nevada, and, consequently, as far as that Section is concerned, the states' authority to regulate, if they have any, is equal.

But passing intergovernmental immunity, it becomes clear that the Company's sale to the Navy is of concern to Nevada as well as to California. The Company makes other sales of electric energy in Nevada (R. 7, *supra*, p. 5), and the costs of furnishing energy to the Navy and the revenue derived therefrom concern Nevada, since they are part of the Company's over-all costs and revenues which, of course, affect the rates charged to the other Nevada consumers. See *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334; cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23. Indeed, in these circumstances, Nevada's concern would be greater than that of California, if the latter's sole interest were, as asserted by the California Commission (R. 11), its control over the Company. Cf. *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 184, fn. 2; *Pennsylvania* v. *West Virginia*, 262 U.S. 553. Since it is plain that Nevada's concern with the sale is at least equal to that of California, whatever jurisdiction California might have over the sales by virtue of Section 20 is shared with Nevada and could not be exercised, as attempted here, by the California Commission acting alone.

(b). The statutory conditions prescribed for joint exercise of jurisdiction by California and

Nevada have not been fulfilled and, consequently, Section 20 puts jurisdiction over the sales in the Federal Commission. For while it may be that California has provided in its Commission "a commission or other authority to enforce the [Section's] requirements * * * within such State," Nevada has not provided any such commission or other authority. The Nevada Public Service Commission has no extraterritorial jurisdiction, being limited to public utilities operating within the state (Nev. Comp. L. (1929) § 6106).[20] In addition, it is without authority over sales for resale; Section 6149 of the Nevada Compiled Laws (1929) explicitly provides that in no circumstances shall a seller for resale be deemed to be a public utility or subject to the Commission's jurisdiction.[21]

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[20] In so far as here pertinent, Nev. Comp. L. (1929) § 6106 defines public utility subject to the Commission's jurisdiction as "every corporation * * * that now or hereafter may own, operate or control * * * any plant or equipment, or any part of a plant or equipment *within the state* for the production, delivery or furnishing for or to other persons * * * light, power in any form * * *." (Italics supplied.)

[21] Section 6149 provides:

> § 6149. SELLER NOT DEEMED A PUBLIC UTILITY.—FAITH OF STATE PLEDGED. The person or corporation selling such water or electric current to such public utility under such contract approved by the public service commission shall not thereby become, or be deemed to be, a public utility within the meaning of any statute of this state, nor shall it by virtue of such contract be deemed to be within or subject to the jurisdiction of the public service commission of Nevada in any respect whatsoever, nor shall it thereby be deemed to be in any sense a public service corporation, or engaged in a public service. The terms and provisions of this act shall be taken and considered to be a part of any such contract, and the faith of the State of Nevada is hereby pledged against any alteration, amendment or repeal of

Finally, and particularly significant, is the fact that the Nevada Commission has no authority to participate in fixing the joint rate with another state, such as California. Obviously, Nevada has not provided the type of Commission contemplated by Section 20, and this failure operates, by the terms of the statute, to place jurisdiction over the sales to the Navy in the Federal Commission.[22]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1952.

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this act during the existence of any such contract, or any extension thereof, approved by the public service commission of Nevada.

[22] Since, as we show in the text, the Federal Power Act vests jurisdiction over the sales to the Navy in the Federal Commission, it becomes unnecessary to reach the California Commission's further holding that state regulation of this sale would not be a burden on interstate commerce, and hence is not precluded by the Commerce Clause. While such a ruling would be pertinent if Congress had not undertaken to provide regulation (cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23, 29-31), it has no relevance where Congress, by the Federal Power Act, has created a comprehensive and effective scheme of dual regulation (cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329) and vested jurisdiction over sales of this type in the Federal Commission. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, *supra*, at 524.

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